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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 538

HARRY GREGORY, ET AL., PETITIONERS

v.

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Harry Gregory, Charles Van Vactor, and Casper Waters, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on October 17, 1951.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 122–134) are reported at 92 F. Supp. 770. The order of the Court of Appeals for the Sixth Circuit, affirming without opinion the judgment of the District Court (R. 269), is reported at 191 F. 2d 856.

JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 1951 (R. 269). The juris-

diction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under Section 8 of the Selective Training and Service Act of 1940, as amended, a veteran promoted to a higher job after his return from military service is entitled to seniority in that job from the date upon which, in accordance with the custom and practice of the employment, he would have been promoted if he had not entered the military service, or whether he may be denied such seniority merely because he had no absolute contractual right to such promotion, or because nonveterans returning from furlough or leave of absence are entitled to seniority only from the date upon which they actually begin work in the higher position.

STATUTE INVOLVED

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 308, are set forth in the Appendix.

STATEMENT

This action was brought by three restored veterans to enforce their seniority rights as machinist helpers under Section 8 of the Selective Training and Service Act of 1940, as amended (R. 2–5).[1] The district court's judg-

[1] The action was brought against the employer on behalf of all similarly situated veterans (R. 2), but before trial was ordered to proceed in behalf of only the individually

ment dismissing their petition on the ground that the assigned seniority rights were proper (R. 135) was affirmed by the court below (R. 269).

The veterans were employed as laborers by the Louisville & Nashville Railroad Company at the time of their induction into the armed forces in 1941 and 1942 (R. 123–124). By virtue of the then-existing collective bargaining agreement, laborers were entitled to be given consideration for promotion to positions in the skilled crafts "based on ability, merit and seniority" (R. 125). Upon their honorable discharge and return from the armed forces at the end of 1945 and the beginning of 1946, the veterans were restored to their former positions as laborers and shortly thereafter were promoted to machinist helpers with seniority from the dates upon which they would have been promoted had they remained in the continuous employ of the carrier (R. 56–57, 86, 123–124).[2]

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named veterans (R. 35). The collective bargaining agent of the carrier's employees, as well as certain employees who would have been adversely affected, if relief were granted the veterans, intervened as parties defendant (R. 34, 37, 38).

[2] Each veteran's seniority was fixed from the date on which a laborer with less seniority was promoted and began to work as a machinist helper, and he was placed upon the machinist helpers' seniority roster immediately ahead of the non-veteran machinist helper with less seniority as a laborer (R. 123–124). Although the court made no specific findings on the question of whether the seniority status assigned was that which would have been enjoyed but for military service, this may be assumed from the circumstances (see, *infra*, pp. 5–7).

In January 1949, an agreement between the railroad and the bargaining agent for the skilled crafts took away from the restored veterans their seniority as machinist helpers based on treating time in military service as time on the job, and changed their seniority to date from the time, after their return from military service, on which they first performed services as regularly assigned machinist helpers (R. 62, 126–127).

This resulted in the loss by each of the restored veterans of approximately three and one-half years seniority, the period of their military service (R. 127), and in their being given seniority status junior to employees over whom they had had greater seniority as laborers at the time of their induction into the military service, and with respect to whom they would have had greater seniority as machinist helpers if they had not gone into military service (R. 123–124).

The laborers' collective bargaining agreement did not create an absolute right to be promoted to the position of machinist helpers on the basis of seniority. The contract provision required only that laborers "be given consideration for promotion" and that promotion "be based on ability, merit and seniority * * * the Management to be the judge and no partiality to be shown" (R. 125). Under this provision the employer was authorized to hire as machinist helpers persons not

then in the employ of the carrier,[3] but it was also the custom and practice, when promotions were made from the laborers' class, to promote them, if qualified to perform the work, in order of seniority (R. 154, 156, 159, 160–161, 162, 164, 176, 178, 179–180, 230–231).[4]

[3] Petitioners do not claim seniority ahead of such employees who were hired as machinist helpers before they would have been promoted to that job.

[4] Numerous laborers were passed over for promotion because they were colored (denoted on the rosters by "C" or "Col.") (R. 99, 186). Others were not promoted in seniority order either because some fundamental physical or mental defects prevented them from qualifying as helpers (R. 177, 178, 187) or because they refused promotion for a variety of reasons (R. 164–165, 166, 197–198).

Fifteen laborers, excluding Negroes and veterans, were promoted to either machinist or boilermaker helper positions between the time the first petitioner (Waters) entered the armed forces and the time the first one to return (Van Vactor) was promoted (R. 78–85, 235–240). [The brief below of one of the respondents (System Federation No. 91) lists 32 (pp. 12–13), but 16 of these were Negroes who were discriminated against in promotion, and one, C. P. Wallace, was a veteran whose seniority was changed (cf. R. 236 with R. 240) by the January 1949 agreement reducing veterans' seniority.] Of the fifteen laborers so promoted while petitioners were in the military service, all except two moved up to helper positions in accordance with their seniority as laborers.

Despite the veterans' repeated assertions that they would have been promoted before junior laborers (R. 4, 133, 140, 142, 147, 148, 150), and the substantial evidence that promotions to helpers' positions were made in the order of laborer seniority (R. 154, 156, 159, 160–161, 164, 176, 178, 179–180, 230–231), respondents introduced no evidence to show that petitioners would not have been promoted, but relied on the contention that they did not have an absolute right to such promotion and were to be treated the same as furloughed employees.

The restored veteran-petitioners were all qualified to perform the task of machinist helpers,[5] and although they had no absolute right under the collective bargaining agreement to promotion, they would in fact have been promoted, had they remained on the job, when laborers junior to them were promoted.[6]

The carrier virtually admitted this upon their return from the service when it assigned them positions on the seniority roster immediately ahead of machinist helpers promoted from the laborer ranks whose seniority as laborers was immediately below that of the restored veterans (R. 58, 124). This was done pursuant to a memorandum of understanding dated January 15, 1943, under which returning veterans were to "be restored to such position with this Company (in-

[5] This is apparent from their employment as machinist helpers immediately after their return from military service and their retention on the helper roster (R. 8, 123–124).

[6] The veterans asserted in their complaint that they "would have been promoted to mechanics helper at this time had they not been absent in military service" and would have had seniority from that time (R. 4). However, on the theory of the district court, affirmed by the court below, that veterans had to establish (1) a contract right to promotion, and (2) that nonveterans on furlough or leave would have been entitled to the seniority they asserted (*infra*, pp. 7–8), this allegation of fact was rendered irrelevant. Accordingly, the district court made no finding on the point (R. 123–131). But on petitioners' theory of their rights this allegation is critical, and must be taken as true for present purposes, since there are no findings to the contrary and since there is more than substantial evidence in the record that petitioners would in fact have been promoted.

cluding rights to promotion) to which his accumulated seniority entitles him * * * the same as if he had remained in the service" (R. 86).[7]

The district court did not regard as legally relevant the question of whether in fact the restored veterans would have been promoted but for their absence in the armed forces and, as noted above (note 6), made no finding on the point, stating in its conclusions of law that "A great presumption or strong probability that plaintiffs would have been promoted had they remained at their work during the period of their military service does not entitle them to seniority in the promoted position" (R. 133–134). It held that the statute did not guarantee them the right to have time in the armed forces count as time on the job but that the veterans were entitled to seniority as machinist helpers only from the day "on which

[7] An award of the National Railroad Adjustment Board in a similar dispute on another railroad, which the carrier's attorney described as "this case right on the nose" (R. 194), refers to the carrier's position that "it was the custom and practice on this property even before the execution of these agreements for the carrier to promote senior qualified firemen and oiler employes to helper posiitons" (R. 254). Despite the carrier's position, the board concluded in that case that "it is not highly probable that, had he [the restored veteran] remained with the carrier continuously, he would have been promoted" (R. 261–262), after finding that he "might have been promoted to boilermaker helper, or helper in some other craft, before he left to join the army" (R. 260), but that he "had not elected to take promotion before he entered military service and we do not know that he would have elected to take promotion had he been working" (R. 261).

their actual promotion occurred and on which they began work as helpers" (R. 134). The Court of Appeals affirmed on the grounds (1) that promotion was not "automatic," that "although there is a strong probability" of promotion "yet such promotion was not a matter of right or of certainty," and (2) "they would not have obtained the promotions which they are now claiming" if they "had been on furlough or leave of absence, instead of in the service" (R. 269).[8]

REASONS FOR GRANTING THE WRIT

Under the decision below, veterans employed in the railroad industry, in which seniority plays a very important role, lose ground because of their service in the armed forces and have the period of their military service carved out of their seniority as machinist helpers, the positions to which they were promoted on their return. They do not have their time in the army count as time on the job, but occupy the position of machinist's helper with a seniority penalty of three and one-half years, approximately the

[8] The quotations are from the Court's opinion in *Raulins* v. *Memphis Union Station Co.*, 168 F. 2d 466, 469, upon which the Court relied in affirming without opinion the judgment of the district court (R. 269). That the quotations represent the rationale of the instant decision is apparent, not only from the court's reliance upon its former decision in *Raulins*, but also from the district court's findings of fact (see particularly findings 9, 10 and 12; R. 125–127), and conclusions of law which the Court of Appeals adopted (R. 269).

period of their military service.[9] The necessary effect of the decision below is to deprive the restored veterans of a substantial part of their seniority rights because of their service in the armed forces and to place them at a disadvantage compared with their fellow employees who were not called into military service and remained continuously on the job.

The decision should be reviewed because (1) it fails to apply the interpretation of Section 8 of the Selective Training and Service Act clearly established by this Court in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, to the effect that time in military service must be counted as time on the job, (2) it conflicts in principle with the decisions of the Courts of Appeals for the Seventh and District of Columbia Circuits in *Morris* v. *Chesapeake & O. Ry.*, 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967, and *Conner* v. *Pennsylvania RR.*, 177 F. 2d 854 (C. A. D. C.), certiorari denied, 339 U. S. 919, (3) the statutory provision that the restored veteran "shall be considered as having been on furlough or leave of absence during his period of training

[9] Respondents contended below that the veterans received all they were entitled to for the reason, among others, that they lost no seniority as laborers. This is a rather hollow contention in view of the fact that immediately after their restoration they were employed as machinists helpers, the position to which junior non-veteran laborers had previously been promoted.

and service" has created great confusion in the interpretation of veterans' reemployment rights which should be clarified because of the continuing and growing importance of protecting veterans from being prejudiced by their service in the armed forces, and (4) a great number of veterans are affected by the principles and ruling adopted below.

1. This Court held in its recent decision in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, that the restored veteran's job rights upon reemployment under the Selective Training and Service Act of 1940 were to be measured by the rights he would have enjoyed had he remained continuously in his civilian employment during the period of his military service. In the instant case, the veterans would have been promoted and would have begun work as machinist helpers no later than the seniority dates first assigned them upon their return from military service. Under the collective bargaining agreement, their seniority would have dated from that time had they remained on their civilian jobs. The failure of the court below to recognize their right to such seniority upon their reemployment constitutes an obvious departure from the rule established by this Court.

The applicable measure of the veterans' rights—the positions they would have had if they had remained on the job—upon which the vet-

erans here relied and which was rejected by the court below, was enunciated with unmistakable clarity by its reiteration no less than six times in the *Oakley* opinion. The opinion refers to the "Act's treatment of him [the veteran] as though he had remained continuously in his civilian employment" (p. 279), to "his right to the seniority in the restored position which he would have had if he had remained continuously in his civilian employment" (p. 282), to his right to be restored "to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment" (p. 283), and to "the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment" (p. 284). The decision specifically holds that the veteran "assumes, upon his reemployment, the seniority he would have had if he had remained in his civilian employment" (p. 284), and that the expiration of a year "did not terminate the right of the veteran to the seniority to which he was * * * entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment" (p. 285). The purpose of the Act to protect veterans against penalty for their service to the nation had also been an-

nounced in comparable language in earlier decisions of the Court.[10]

[10] *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275:

"The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job" (p. 284).

"Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war" (pp. 284–285).

"He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence" (p. 285).

"Congress protected the veteran against loss of ground or demotion on his return" (p. 286).

Trailmobile Co. v. *Whirls*, 331 U. S. 40:

"The *Fishgold* case held that under the Act a veteran is entitled to be restored to his former position plus seniority which would have accumulated but for his induction into the armed forces" (p. 41).

"That standing included not only his seniority status as of the time he entered the armed forces, but also all that would have accumulated had he remained at work until the date of his reemployment without going into the service" (p. 56).

"The men who were called to service were being inducted for a year's training, with the idea if not the assurance that they would return to civilian life and occupations at the end of that year, without prejudice because of their service" (p. 58).

"The restored veteran, it was held, could not be disadvantaged by his service to the Nation. He 'was not to be penalized on his return by reason of his absence from his civilian job.' 328 U. S. 284. He was to be restored and kept, for the year at least, in the same situation as if he had not gone to war but had remained continuously employed or had been 'on furlough or leave of absence' " (p. 58).

The present pertinence of the *Oakley* decision is emphasized by the fact that the foregoing definition of rights protected by the Act was uttered in a factual context virtually identical to that present here. Neither of the employees involved in that case claimed seniority in the position he had left. One claimed seniority at a different job location from the date he would have been transferred to that location "had he not been in the Armed Forces" (p. 280). The other, who was a machinist helper when inducted, claimed seniority as machinist apprentice from the date he would have been promoted to that position but for his military absence (p. 281). As here, the veterans had to elect to transfer or to qualify for promotion. For nonveterans in these circumstances, seniority would date from the time of actual work on the job. Arguments embodying legal theories similar to those adopted by the court below were advanced in this Court

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Dissenting opinion in *Trailmobile* case:

"In brief, in employments that were governed by priority rights, absence in the armed services was treated as presence in the plant. The veteran acquired a rating which he would have had, had he not been away" (p. 62).

"The veteran at the end of the year certainly is not in a worse position than he would have been had he not been in the armed services" (p. 63).

"In assuring not merely the retention of seniority status but its progression during the years in the service, Congress aimed to insure that the years which the veteran gave to his country should not retard his economic advancement" (p. 63).

and disregarded. Complaints charging, as here,[11] that veterans were denied the seniority they would have had if they had remained continuously in civilian employment were upheld as stating valid causes of action. Although that case happened to deal with the duration of the rights protected by the Act, the rationale of the decision was that the veterans' complaints asserted valid employment rights under the Act which survived one year.

2. In rejecting the petitioners' claim of seniority rights from the time they would have been promoted had they remained on the job, the courts below held (1) that to receive the protection of the Act the veteran must prove an absolute contractual right, automatically effective, rather than a custom, practice or factual certainty of

[11] The stipulation which was adopted by the district court (R. 123) does not and was not intended to deal with this factual issue (R. 138–150). The fact that "Separate and distinct collective agreements are made covering rules and working conditions for employees" in the unskilled and skilled crafts (R. 55), is without significance since there was a contract right in laborers to "be given consideration for promotion" to the skilled crafts on the basis of "ability, merit and seniority" (R. 60). The facts that this provision did not require the promotion of laborers in order of seniority as a matter of legal right, that non-employees were hired as helpers although laborers were available, or that some laborers (principally Negroes, see note 4, *supra*) were not promoted in seniority order (R. 60), obviously do not negative the veterans' assertion that they would in fact have been promoted prior to the promotion of junior laborers had they remained on the job. See pp. 5–7, *supra*.

promotion to a higher job classification had he remained on the job,[12] and (2) that, in any event, the veteran's seniority in the higher job, like that of nonveteran employees on furlough or leave of absence, runs only from the date upon which he actually began work in the higher job.

As shown above, the formula of *Oakley,* that the veteran is entitled to the status he would have enjoyed but for his military service, would seem to foreclose adoption of these rules. But even if *Oakley* is not deemed controlling, the decision below presents a conflict on these grounds with the decisions of two other courts of appeals. *Morris* v. *Chesapeake & Ohio Ry. Co.,* 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967; *Conner* v. *Pennsylvania R. Co.,* 177 F. 2d 854 (C. A. D. C.), certiorari denied, 339 U. S. 919.

In the *Morris* case, the veteran, a telegrapher in the employ of the railroad at the time of his induction, was promoted to the position of train dispatcher upon passing a qualifying examination shortly after his restoration to employment. It had been customary under the collective bargaining agreement to permit telegraphers to apply for the position of train dispatcher in the order

[12] This is made absolutely plain by the District Court's conclusion of law that "A great presumption or strong probability that plaintiffs would have been promoted had they remained at their work during the period of their military service does not entitle them to seniority in the promoted position" (R. 133–4). The Court of Appeals adopted this conclusion (R. 269).

of their seniority as telegraphers, and to promote them if they passed a qualifying examination. The agreement provided that "seniority as dispatcher will date from date employee passes the required examination and qualifies as dispatcher" (p. 580). The veteran claimed seniority, however, from the date upon which the next junior telegrapher had been promoted to the position of train dispatcher during his absence, rather than from the time he passed the examination.

In ruling that the restored veteran was entitled to the seniority claimed, the Court of Appeals for the Seventh Circuit held that the veteran's "military service legally excused him from his failure to bid for the two vacancies filled while he was in the service by two men who were junior to him on the telegraphers' seniority roster" (p. 580). "To hold in this case that Morris should have qualified as a dispatcher before he did, would circumvent the purpose and spirit of the Act" (p. 580).

In the *Conner* case, veterans on the freight trainmen seniority list sought seniority on the passenger trainmen list from the date upon which they would have transferred to the latter list had they remained continuously in their civilian employment. The collective bargaining agreement provided that "when additional passenger trainmen are needed the applications of freight and yard trainmen * * * *shall be given consid-*

eration."[13] If a freight trainmen applied for transfer to the passenger service and was deemed qualified, he was placed at the bottom of the passenger trainmen list. Applications were considered in the order of the seniority of the applicants as freight trainmen. Upon their return from military service, the veterans, who were originally on the freight list, claimed the right to be placed on the passenger list immediately ahead of the men who had been their juniors on the freight list and who had transferred during the period of the veterans' military service.

The Court of Appeals held that under the Act "an employee who enters the military service must be given, upon his return, the same seniority which he would have had had he not been in the service" (p. 857). It pointed out that "When additional passenger trainmen were needed, the *established practice* was to transfer to passenger service *qualified* trainmen in freight service who made application for such transfer and who possessed the highest seniority in freight service" (p. 857). This was described as "an *opportunity to transfer* by election of the employee, the requirement of qualification *being usually, if not universally, met* by employees already in good standing in the freight service" (pp. 857–858). The court concluded therefore "that when the

[13] Italics supplied throughout the discussion of the *Conner* case.

employee returned from the service, he should have been accorded the privilege of transfer which he would have had had he not been in the service" (p. 858). The court explained that the reason for antedating the veterans' seniority "was that they were not present when the opportunities arose. To allow these men to transfer but to place them at the bottom of the list would be to penalize them by reason of their being in the service. The Selective Training and Service Act was designed to prevent that type of treatment" (p. 858).

Both of these cases squarely held, contrary to the decision below, that an opportunity to be considered and to qualify for promotion or change in status, rather than an absolute right automatically effective, was within the protection of the Act. After their return, the veterans were permitted to exercise their election and to qualify. If qualified, they were given seniority as of the date they would have qualified had they remained on the job.

These decisions are opposed to the decision below, not only in rejecting the requirement of an absolute contract right, but also in refusing to limit the rights of veterans to those of non-veterans on furlough or leave of absence. In the instant case, the skilled workers' employment agreement provided that seniority commenced on the date that the employee began work as a machinist helper. The court reasoned that, under

this provision, the seniority of employees on furlough or leave would not start until they were actually on the job, and, therefore, that the seniority of restored veterans, whose status was to be equated with that of employees on furlough or leave, did not begin until they returned from service and actually began work.

In the *Morris* case, employees on furlough or leave would not have been present to qualify for promotion, a contract condition to the commencement of seniority. In the *Conner* case, these employees would not have been present to apply for transfer. There is no suggestion in the opinions that furloughed nonveterans were entitled to a waiver of these contract requirements or that the courts even considered this as relevant. Veterans were held entitled to predated seniority, not because the contract gave furloughed employees this right, but because the Act required the waiver of such conditions where the employee's services in the armed forces made compliance with the conditions impossible.[14]

3. The "furlough or leave of absence" test results from the language of Section 8 (c) which

[14] The suggestion of respondents in the court below that this interpretation of the statute gives veterans the super-seniority outlawed in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, is completely misconceived. The super-seniority there referred to was a status superior to that of nonveterans who remained continuously at work. If veterans were to enjoy no better status than nonveterans who were away from work for other reasons, the statutory protection would be slim indeed.

provides that a restored veteran "shall be considered as having been on furlough or leave of absence during his period of training or service in the land or naval forces" and "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces". But Section 8 (c) also contains the unequivocal direction that employees "shall be so restored without loss of seniority."

The simultaneous application of both provisions in some situations is obviously impossible. In the instant case, for example, where employees on furlough or leave lose seniority by virtue of their absence, the equation of their rights with those of restored veterans results in disregard of the requirement of restoration "without loss of seniority." This apparent dilemma perhaps explains the divergent rules of the different courts.

It is clear, however, that the "furlough or leave" language was not intended to penalize the veteran for his service to his country. In its original form the statutory language contained no reference to "furlough or leave", but required, among other things, that the employee be restored "without loss of seniority." The addition of the "furlough or leave" language was intended to enlarge rather than diminish the protection of the statute, presumably by preserv-

ing a continuous employment relationship.[15] The basic purpose of the statute, to protect restored veterans against losing ground by virtue of their military service, would be nullified if veterans were to suffer loss of seniority because of their absence wherever, under the custom or contract of employment, nonveterans on furlough or leave lost seniority.[16]

The fallacy of the "furlough or leave" test is further disclosed by the provisions and legislative history of the Selective Service Act of 1948.[17] No important substantive changes with respect to reemployment were made in the 1948 act because of the policy that "no reemployment rights should be granted to personnel serving under this

[15] The "furlough or leave" phrases did not appear in S. J. Res. 286, relating to the National Guard, the parallel bill to the Selective Training and Service Act of 1940, which was the first bill to pass both Houses of Congress (86 Cong. Rec. 10759–10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, 54 Stat. 858). When the reemployment provisions of the National Guard Act were carried over into the Selective Service bill (86 Cong. Rec. 10922–10923), paragraph 8 (c) was amended to its present form (86 Cong. Rec. 10914, 11702). The addition of the language relating to the treatment of employees "as on furlough or leave of absence" was explained as intended to enlarge rather than reduce the protection previously accorded (86 Cong. Rec. 11702).

[16] For example, collective bargaining agreements commonly provide that a furloughed employee loses his seniority after a stated period of furlough.

[17] The reemployment provisions of the Selective Service Act of 1948, 62 Stat. 604, were extended indefinitely when, at the time of amendments not relevant here, its name was changed in 1951 to the Universal Military Training and Service Act (65 Stat. 75).

legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 act." S. Rep. 1268, 80th Cong., 2d sess., p. 15.

Section 9 (c) (2) of the Selective Service Act of 1948, referring to language identical with that contained in Section 8 (b) of the 1940 Act, except for additions not relevant here, provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

This paragraph does not purport to create additional benefits but merely to state the effect of the provisions referred to. Cf. *Stockdale* v. *Atlantic Ins. Co.*, 20 Wall, 323, 336; *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640, 658. The Senate Report refers to this provision as a "statement of policy regarding application of the 'escalator principle'" (p. 16). The so-called "escalator principle" is obviously a reference to the principle announced by this Court in *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275, and the policy stated is but a paraphrase and ratification of the

principle announced and repeated in the decisions of this Court. It cannot be reconciled with the decision below that restored veterans are entitled only to seniority equivalent to that of employees on furlough or leave, even though that seniority is less than the seniority enjoyed by employees who remained in continuous employment.

Despite the wide reach of the principle enunciated in this Court's decisions to effectuate the Act's purpose of protecting the returning veteran from prejudice because of his military service, many decisions applying the "furlough or leave" test or other restrictive theories have denied to veterans the status or emoluments they would have enjoyed if they had remained on the job.

Under the interpretations of many courts, the blanket of protection which Congress intended to provide in the enactment of the Selective Service and Training Act of 1940 has worn through in many spots and has become a threadbare cover. For example, since this Court's reversal in *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, of the decision of the court below that the Act gave veterans protection against reduction in seniority not enjoyed by non-veterans remaining on the job, the Court of Appeals for the Sixth Circuit, through a misinterpretation of this Court's decisions in *Fishgold* and *Whirls,* has consistently denied veterans' claims to the normal incidents of their employment status that they would have enjoyed had they remained continuously at work. See

Gregory v. *Louisville & Nashville R. Co.,* 191 F. 2d 856 (the instant case); *Brown* v. *Watt Car & Wheel Co.,* 182 F. 2d 570; certiorari denied, 340 U. S. 875, *Nevins* v. *Curtiss-Wright Corp.,* 172 F. 2d 535; *Trischler* v. *Universal Potteries, Inc.,* 171 F. 2d 707; *Haynes* v. *Southern Ry. System,* 171 F. 2d 128, reversed, 338 U. S. 278; *Oakley* v. *Louisville & N. R. Co.,* 170 F. 2d 1008, reversed, 338 U. S. 278; *Raulins* v. *Memphis Union Station Co.,* 168 F. 2d 466.

The decisions of other courts of appeals have similarly penalized veterans because of their absence in military service. Promotions which veterans would have received have been refused (*Lipscomb* v. *Tennessee Coal Iron & R. Co.,* 189 F. 2d 708 (C. A. 5); *Special Service Co.* v. *Delaney,* 172 F. 2d 16 (C. A. 5); *Hewitt* v. *System Federation No. 152, etc.,* 161 F. 2d 545 (C. A. 7); *Spearmon* v. *Thompson,* 167 F. 2d 626 (C. A. 8) (Delozier)); military service has not been counted in computing length of service where relevant in determining both severance pay (*Seattle Star* v. *Randolph,* 168 F. 2d 274 (C. A. 9)), and the pay rate on the job (*Harvey* v. *Braniff International Airways, Inc.,* 164 F. 2d 521 (C. A. 5); *Altgens* v. *The Associated Press,* 188 F. 2d 727 (C. A. 5)); vacation pay has been denied (*Foster* v. *General Motors Corp.,* 191 F. 2d 907 (C. A. 7)); probationary (*Lesher* v. *P. R. Mallory & Co.,* 166 F. 2d 983 (C. A. 7)), and furloughed (*Barbee* v. *Capital Airlines,* 191 F. 2d

507 (C. A. D. C.), certiorari denied January 7, 1952) employees have lost their jobs.

In other cases, however, the Act has been applied to make the veterans whole by treating them as though they had remained at work regardless of the existence of absolute contract rights to advancement or the rights of employees on non-military absences. See, for example, *Conner* v. *Pennsylvania R. R., supra; Spearmon* v. *Thompson,* 167 F. 2d 626 (C. A. 8), certiorari denied, 335 U. S. 822; *Morris* v. *Chesapeake & O. Ry.,* 171 F. 2d 579 (C. A. 7), certiorari denied, 336 U. S. 967; *Levine* v. *Berman,* 161 F. 2d 386 (C. A. 7); *Schreier* v. *M. H. Fishman Co.,* 176 F. 2d 722 (C. A. 3); *Loeb* v. *Kivo,* 169 F. 2d 346 (C. A. 2); *Mentzel* v. *Diamond,* 167 F. 2d 299 (C. A. 3); *MacLaughlin* v. *Union Switch & Signal Co.,* 166 F. 2d 46 (C. A. 3); *Payne* v. *Wright Aeronautical Corp.,* 162 F. 2d 549, 551–552 (C. A. 3); *Trusteed Funds, Inc.* v. *Dacey,* 160 F. 2d 413 (C. A. 1); *Rudisill* v. *Chesapeake & O. Ry. Co.,* 167 F. 2d 175 (C. A. 4). At times, results have varied in the same circuit with differences in factual situations which should be legally irrelevant.

Determination of the questions presented by the present case should go far to resolve the uncertainty, confusion, and conflicts now existing with respect to veterans' reemployment rights. Reestablishment of the basic principle that veterans are to be treated as if they had been continuously on the job will both bring order into this semi-anarchic field and also relieve many vet-

erans of undue economic penalties flowing from their military service.

4. We have been advised by the Department of Labor that the rights of some 800 veterans in the employ of the Louisville & Nashville Railroad are affected by the instant decision. The same question is presented in *Bunner* v. *B. & O. R. R.*, now pending in the District Court for the Northern District of West Virginia. If the decision below remains as the governing principle, all seniority rosters of the Baltimore and Ohio Railroad not merely those affected by the *Bunner* case, would be revised.[18]

The questions presented here occur in identical or related form in virtually all unionized industries where seniority and other job rights "derive their scope and significance from union contracts."[19] See *Aeronautical Lodge* v. *Campbell,* 337 U. S. 521, 526.[20] The problems are of

[18] The 1943 Agreement (*supra*, pp. 6–7), pursuant to which the veterans' seniority was first antedated, was the standard agreement adopted on most railroads throughout the country.

[19] See United States Department of Labor, Bulletin No. 908–7, pp. 17–26; United States Department of Labor, Bulletin No. 908–11, pp. 3–22, *passim.* See also, *e. g.*, collective bargaining agreement between United Steel Workers of America and Bethlehem Steel Co.; between International Brotherhood of Electrical Workers and Southern California Edison; between United Auto Workers and General Motors Corporation; between Textile Workers Union and Industrial Rayon Corp.

[20] The court below relied upon this decision in affirming the judgment of the district court for reasons which are not entirely clear. It appears to have been cited for the proposition that veterans' seniority rights must be determined in accordance with the terms of the applicable collective bar-

importance in determining not only existing rights under the Selective Training and Service Act of 1940 which are still being litigated,[21] but also rights under the Selective Service Act of 1948, as amended, which contains the same statutory language and thus presents the same problems of interpretation for the future.[22]

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gaining agreement, and since the agreement here required employees to begin work before their seniority would start, that veterans can claim seniority from no earlier date. The *Campbell* decision makes clear, however, that the employment contract fixes only those rights which affect veterans and non-veterans alike. Provisions which have the effect of penalizing veterans because they were in military service are not binding upon them. Consequently, the contract provision involved here is not controlling. See also *Fishgold* v. *Sullivan Dry Dock and Repair Corp.*, 328 U. S. 275, 285. If the veteran were required to look only to the agreement for the determination of his rights, the statutory protection would be virtually nullified. Both the agreement and the Act are given appropriate effect by looking to the agreement to ascertain the rights of non-veterans and then applying the Act to guarantee to veterans the same rights as they would have enjoyed under the agreement had they not gone into military service but had remained continuously on the job.

[21] The Thirty-Eighth Annual Report of the Secretary of Labor (1950) includes "the veteran's rights to promotions" among important issues which "are still undetermined and await further litigation" (p. 78). Referring to "the outbreak of hostilities in Korea," the Secretary of Labor reports "an immediate manifestation of interest by persons likely to be called into military service concerning their right to return to their civilian employment." *Ibid.*

[22] Secretary of Defense Marshall testified that a Military Establishment of three and one-half million would require replacements of 800,000 annually. Hearings before House Committee on Armed Services on H. R. 1752, 82d Cong., 1st

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1952.

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sess., p. 17. In his State of the Union message this year, the President disclosed that the Armed Forces have almost reached the 3,500,000 mark. 98 Cong. Rec. 30 (unbound edition).

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APPENDIX

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U. S. C. App. 308, reads in part, as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this Act for training and service shall be given a physcial examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department: *Provided,* That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ

of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces,

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and shall not be discharged from such position without cause within one year after such restoration.

(d) Section 3 (c) of the joint resolution entitled "Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service", approved August 27, 1940, is amended to read as follows:

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's un-

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lawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against the person so applying for such benefits.

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No. 538.

IN THE

Supreme Court of the United States

October Term, 1951.

HARRY GREGORY, ET AL., - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD CO., ET AL., - - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, IN OPPOSITION.

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February 29, 1952.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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the custom* to make, such promotions in seniority order and the agreement governing the employment of machinist helpers provided that seniority shall date from the day on which the employe first performs service on a regular assignment in that craft, were petitioners entitled by virtue of the Act to seniority as machinist helpers retroactive to the date on which they might have been promoted had they not been absent?

STATEMENT.

Petitioners left positions as laborers in the employment of the railroad to enter military service. When they returned, they were restored to their positions as laborers (R. 56-57) with their original seniority dating (R. 56) as such laborers.† Shortly thereafter they were promoted to positions as machinist helpers (R. 57), a craft or class "completely separate and distinct" from that of laborers (R. 59).

While employed as laborers, petitioners were subject to and acquired seniority under the "unskilled agreement" (R. 55; Exhibit 1, R. 265). When they became machinist helpers they were subject to and acquired "wholly separate" seniority (R. 59) under a separate collective bargaining agreement referred to (R. 56) as the "skilled agreement" (Exhibit 3, R. 266).

The unskilled agreement contains a provision (R. 60) that employes covered thereby will be "given con-

*Petitioners' statement of the question incorrectly assumes an established custom to promote laborers in seniority order to helper positions.

†Petitioners continued to accumulate seniority as laborers while they were in military service, and when they were restored with their original seniority datings they thereby received cumulative seniority credit for all the time they were absent.

sideration for promotion" to positions under the skilled agreement and that such promotions will be based on "ability, merit and seniority." It was stipulated (R. 60) that at no time has that provision been intended, interpreted or applied as requiring the railroad to promote laborers in the order of their seniority.

The skilled agreement contains a provision that seniority in the several crafts covered by that agreement (including machinist helpers) shall commence on the date on which the employe first performs service on a regular assignment in the particular craft (R. 60-61, 126).

Contrary to that provision, when petitioners (and numerous other veterans similarly situated) were promoted to positions under the skilled agreement, each was given seniority in the new position as of the day a laborer junior to him on the *laborers'* seniority roster was promoted during the veteran's absence (R. 57-58).* The practice of giving retroactive seniority to helpers promoted from laborer positions after their

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*The circumstances under which this predated or retroactive seniority was given in contravention of the skilled agreement are fully set forth in Exhibit 4 (R. 69-72) with the stipulation, which is the collective agreement under which petitioners' seniority datings were changed to conform to the requirements of the skilled agreement. Paragraph F of the correcting agreement is as follows (R. 70):

> "(F) The government agency in charge of the administration of the Selective Training and Service Act, was during the time mentioned contending that Section 8 of that Act required that returned veterans be given this special preference and certain of the lower Federal courts had so held. The parties hereto accepted this interpretation of the Selective Training and Service Act and acted as they supposed in accordance with their duties under that statute."

That refutes petitioners' unsupported statement (pp. 6, 26 footnote 18) that retroactive seniority was assigned to veteran laborers pursuant to a memorandum of understanding dated January 15, 1943 (R. 86). In quoting (pp. 6-7) from that memorandum petitioners conveniently omit the clause "all in accordance with the existing rules of the schedule agreement."

return from military service was attacked by non-veteran helpers in a suit filed in the District Court at Louisville (R. 61) against this respondent and others. In that action the District Court held that the Selective Training and Service Act of 1940 did not require that veterans be given "this superseniority" (R. 99) and that such was a violation of the rights of non-veterans (R. 121).

On January 31, 1949, after the trial of that action, this respondent entered into an agreement (R. 16-19) with its employes (including petitioners ~~respondents~~) represented by the collective bargaining agents of the skilled crafts, providing in part that:

> "3. . . . in each instance where a veteran held seniority only as a laborer in the unskilled craft at the time of his induction or enlistment in the armed forces of the United States and has been promoted to a position of helper, his seniority as helper shall date from the day when he first performed services as a regularly assigned helper after returning from the armed forces."

In accordance with that agreement the seniority dating of each of the petitioners (and all others similarly situated) was changed to the date he first performed regularly-assigned service as a helper, rather than the earlier dating previously assigned to him through error and misunderstanding of the law.

REASONS WHY THE PETITION SHOULD BE DENIED.

Respondent submits that the petition for a writ of certiorari should be denied because (1) petitioners request review of a question of fact which has been decided against them by the courts below; (2) petitioners were not denied any right under the Selective Training and Service Act; and (3) the claimed conflict in Federal Court decisions does not exist.

PETITIONERS REQUEST REVIEW OF A QUESTION OF FACT WHICH HAS BEEN DECIDED AGAINST THEM BY THE COURTS BELOW.

The basic premise of the petition herein is that although the record allegedly shows that it was the custom and practice to promote laborers to helpers in seniority order, the District Court and the Court of Appeals gave no consideration to this claimed custom and practice. Petitioners assert (p. 6, n. 6) that the District Court made no finding on this "critical" issue and (pp. 14-15) that the courts below ruled against them because they did not show a contract right to promotion.

Respondent asserts that the issue of custom was not only considered by both of the courts below, but that the District Court found that no such custom was shown to exist and the Court of Appeals affirmed that finding. In his opening statement to the District Court, petitioners' counsel, Mr. Leet, stated the Government's theory of the case as follows (R. 139): "It is our view that in this case these men had not a high probability,

but an absolute certainty of promotion . . ." He insisted (R. 148) that "It is not a contractual right case at all . . ." A colloquy (R. 148)* between the trial court and counsel for the parties concerning the issues shows beyond any doubt that the Court understood the distinction between "contractual right" and "factual certainty." Thus it was made perfectly clear at the outset that counsel for petitioners was relying on a claimed custom to promote laborers in seniority order. The District Court squarely found that there was no such custom. See the following statement (R. 126) in the Findings of Fact:

> "On numerous occasions, before, during and after the period of plaintiffs' absence in the armed forces, the defendant Railroad Company employed as machinist helpers persons who were not working either as laborers or as machinist helpers and who held no seniority in either classification, even though there were then available laborers who might have been, and some of whom subsequently were, promoted to positions as machinist helpers. Some of the laborers promoted to machinist helpers before, during and after plaintiffs' absence in the armed forces, were not promoted in order of their seniority as laborers."

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*"Mr. Lyman: . . . We have stipulated there is no contractual right.

". . .

"Mr. Leet: And the fact that all these other fellows were promoted in seniority order and that shows a factual certainty they would have been promoted, . . .

"Mr. Lyman: I submit that Mr. Leet is trying to confuse the thought. . . . he is trying to say the statute entitled them to get it because if they had not been veterans and been here instead of in the Army they would have had it.

"By the Court: That is what he is saying now.

"Mr. Lyman: All right.

"Mr. Leet: I don't think the Court is a bit confused."

Having thus found that there existed no factual certainty that petitioners would have been promoted had they not been in the armed forces, the Court quite properly included in its Conclusions of Law II this statement (R. 133-134):

> "A great presumption or strong probability that plaintiffs would have been promoted had they remained at their work during the period of their military service does not entitle them to seniority in the promoted position."*

In the Court of Appeals, petitioners argued that they had amply demonstrated in the lower court a customary practice of promotion in accordance with seniority rank. This respondent answered that argument by demonstrating that petitioners had not shown such a custom. Petitioners correctly state here (p. 8) that one of the grounds upon which the Court of Appeals affirmed was that such promotion was not a matter of "right or of certainty," that is, "contract right" or custom-derived "factual certainty." For the Court cited its opinion in *Raulins* v. *Memphis Union Station Co.*, 168 F. 2d 466, where the plaintiffs had based their claims to promotion on contract right "and also upon the alleged established custom of filling vacancies in the position of electrician by appointment of those having the highest seniority in the position

*In footnote 12, p. 15, petitioners state that this conclusion makes it "absolutely plain" that the courts below rejected petitioners' "factual certainty" theory and decided the case on the "contractual right" theory. Petitioners thus attempt to equate "strong probability" and "factual certainty," which cannot be done. The courts adopted this conclusion because they had examined petitioners' evidence in support of a custom and practice showing factual certainty of promotion and had found it insufficient to show more than a strong probability.

of electrician-helpers" (p. 468). The trial court in *Raulins* ruled that plaintiffs had not shown a right to promotion "by virtue of any custom or by virtue of any contract" (p. 469). It was in this context that the appellate court, affirming the judgment there, said that "such promotion was not a matter of right or of certainty . . . " (p. 469).

In light of the foregoing it is futile for petitioners to now contend that the courts below did not pass upon the question of custom upon which petitioners' case was based.

Before this Court could reach the question of the effect of the alleged custom to promote laborers in seniority order, it would have to find as a fact that such custom existed. To so find, this Court would have to review and overturn the concurrent findings of fact of the two courts below, action which the Court has said it is unwilling to take in the absence of a very obvious and exceptional showing of error (*Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275). No such showing has been or can be made here. That being so, Mr. Justice Holmes' terse dictum that "We do not grant a certiorari to review evidence and discuss specific facts"* should control here.

PETITIONERS WERE NOT DENIED ANY RIGHT UNDER THE SELECTIVE TRAINING AND SERVICE ACT.

Petitioners say (p. 2) that they would have been promoted "in accordance with the custom and practice of the employment" had they not been in military service, and (p. 5) that when laborers were promoted

**United States* v. *Johnston*, 268 U. S. 220, 227.

it was the custom and practice to promote them "in order of seniority."* But as shown under the previous heading, these statements are directly contrary to the previously-quoted findings of the District Court (R. 126).

The argument (pp. 8-9) that petitioners' period of military service has been "carved out" of their seniority as machinist helpers and that they have thus been deprived of a substantial part of their seniority rights ignores the fact that they had no seniority or other rights as helpers when they entered military service, and erroneously assumes the existence of the very rights which they have been unable to establish.

Petitioners' argument (pp. 9-14) that the decision of the courts below conflicts with the interpretation of the Act "clearly established" by this Court in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, is untenable. The sole question before the Court in *Oakley* was the duration of the veteran's rights, not a definition of them. The Court did not hold that the veteran was entitled to the higher rating he claimed he would have had if he had not entered military service. Its remarks on this point were entirely suppositive, its holding being strictly confined to the issue of duration:

> "*If he were entitled to the higher rating* upon his reemployment, the Act did not deprive him

*Obviously, the custom-and-practice argument would be pointless without the further contention that when laborers were promoted such promotions were made in seniority order. But petitioners try to establish their contention that laborers were promoted in seniority order by attempting to explain why so many were promoted out of seniority order. One has only to refer to Exhibits 5, 6 and 7 (R. 73, *et seq.*) and glance down the column to the right of each page to see that laborers frequently were not promoted in seniority order.

> of that rating merely by virtue of the expiration of his first year of reemployment." (Emphasis supplied.) (338 U. S. at p. 284.)

There is thus no intimation in *Oakley* or in any other case from this Court that the veteran is to be treated as if he had remained continuously "on the job," as petitioners contend.* The Court not only refrained from passing on the question involved here, but the statements quoted by petitioners from that opinion had reference to the "particular employment" in which the veteran was engaged before he went into military service, and not to a position which otherwise he might have acquired. Petitioners had no seniority or other rights as machinist helpers until they established such rights by performing actual services on regular assignments in that craft (R. 60-61, 126).† In *Delozier* v. *Thompson, et al.* (8 Cir.), 167 F. 2d 626, certiorari denied 335 U. S. 886, the Court of Appeals, affirming judgment against Delozier, said (pp. 631-2):

> "Although it is stipulated that had he remained in the position of helper until November

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*Upon remand, the trial court did not construe the *Oakley* opinion as requiring that the veteran be afforded the status he claimed. Granting the defendant's motion for summary judgment, the Court said (19 CCH Labor Cases Par. 66,132, p. 78,816):

> "The [Act], as amended, did not require defendant Railroad Company to accord to plaintiff a seniority status in a position other than that which he left to enter the armed forces, to which status his seniority in his restored position did not automatically entitle him, and which, had he not been in the armed forces, he could or might have achieved only by actually going to work in such other position."

†In his conclusions of law the District Court said (p. 133):

> "II. Seniority acquired by plaintiffs as laborers could not be counted as seniority on the machinist helper seniority roster prior to plaintiffs' actual promotion to positions as helpers. Seniority in one class does not constitute seniority in another. *Boston & M. R. Co.* v. *David*, 167 F. 2d 722 (CCA 1)."

2, 1942, he would on that date have been advanced to the position of mechanic, it is a conceded fact that he occupied the position of helper at the time of his induction. The seniority which accrued to him during the time he served with the armed forces was seniority in the position of helper and not as mechanic. Since he was restored to the position of helper upon his return, he can have no just complaint that his rights under [the Act] have not been fully accorded to him."

THE CLAIMED CONFLICT OF FEDERAL COURT DECISIONS DOES NOT EXIST.

Petitioners' second point (p. 15) that the decision below conflicts with *Morris* v. *Chesapeake & O. R. Co.*, 171 F. 2d 579 (C. A. 7), and *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C. A. D. C.), is equally untenable. In the *Morris* case it was not only customary (as petitioners say) to permit telegraphers to apply for train dispatcher positions in the order of their seniority, but such was the *right* of the telegraphers under their collective agreement. That right was recognized in the employer's agreement with the train dispatchers, and vacancies in the latter group were advertised to telegraphers for seniority bidding without respect to whether the employees were working as telegraphers or were on leave of absence or in military service. Morris was notified of and bid for a position while in military service, but had not been notified of three previous vacancies occurring during his absence, all of which had been filled by telegraphers junior to Morris. In holding that Morris was entitled to the first of the three vacancies occurring during his absence,

the Court did not set a precedent applicable to the facts here, where petitioners had no agreement right to bid on helper positions, either *in absentia* or while on the job, nor any agreement or other right to promotion in seniority order.

Petitioners misstate the facts in the *Conner* case in saying (p. 16) that the veterans (freight trainmen) sought seniority on the passenger trainmen list from the date upon which they would have transferred to the latter list had they remained continuously in their civilian employment. Exactly to the contrary, the plaintiffs (veterans) there complained because the railroad had permitted other veterans to transfer from the freight list to the passenger list as of the dates they would have had a right to elect to transfer had they not been in military service. The plaintiffs relied upon *Hewitt* v. *System Federation,* 161 F. 2d 545; *Raulins* v. *Memphis Union Station Co.,* 168 F. 2d 466, and *Boston & Maine R. Co.* v. *David,* 167 F. 2d 722, but the court distinguished those cases by saying (p. 858) that:

> "None of those cases dealt with a contractual right to transfer from one roster to another on the basis of seniority."

The right of the veterans in the *Conner* case to transfer in seniority order is similar to the right of the telegraphers in the *Morris* case to promotions in seniority order. No such right existed here.

Petitioners' argument (p. 19, *et seq.*) against the application of the "furlough or leave of absence" test prescribed by the Act is merely an argument that the

plain language of the Act should be ignored. In support of the argument, petitioners state (p. 20) that respondent's "employees on furlough or leave lose seniority by virtue of their absence," from which they would have the Court conclude that it would be contrary to the Act's prohibition against loss of seniority to treat petitioners as non-veterans returning from leave of absence are treated. But the statement is untrue. A laborer on non-military leave of absence continues to accrue seniority as laboror. So did the petitioners while on military leave of absence. A laborer on non-military leave does not acquire seniority in a helper position becoming vacant during his leave and for which he might have been selected had he been on the job. Neither did the petitioners while on military leave. It is because petitioners did not *gain* this new seniority in positions in another craft that petitioners contend that they *lost* seniority by reason of their absence in military service. Petitioners' attempt to make "to gain" synonymous with "to lose" is novel, but unavailing. Therefore, the "apparent dilemma" which petitioners envision (p. 20) does not exist.

Although the *Conner* and *Morris* cases can, as above shown, be distinguished from the *Raulins, Hewitt* and *David* cases on the facts, yet petitioners persist in contending, in effect, that all decisions which apply the "furlough or leave of absence" test as it was applied in such cases as *Raulins* should be overruled and that this Court should adopt a theory of "superseniority" for veterans, contrary to its decision in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275, that Congress has not sought to "sweep aside the seniority

IN THE

Supreme Court of the United States

October Term, 1951.

No. 538.

HARRY GREGORY, ET AL., - - - *Petitioners,*

v.

LOUISVILLE AND NASHVILLE RAILROAD CO., ET AL., - - - - - - *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, IN OPPOSITION.

COUNTER-QUESTION PRESENTED.

Where petitioners were fully restored to their positions as laborers in accordance with the requirements of the Selective Training and Service Act of 1940, and were thereafter promoted to machinist-helper positions in a different craft in which they had no previous seniority, and where the agreement governing the employment of laborers did not require, and it was not

system" but has undertaken to give the veteran protection "within the framework of the seniority system" (p. 288). They would also have this Court ignore its decision in *Aeronautical Ind. Dist. Lodge* v. *Campbell,* 337 U. S. 521, 526, where it is said that in providing that a veteran shall be restored "without loss of seniority:"

> ". . . Congress was not creating a system of seniority but recognizing its operation as a part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran."

Also that:

> ". . . seniority rights derive their scope and significance from union contracts, . . ."

It was stipulated (R. 61) that the retroactive seniority as machinist helpers assigned to petitioners antedating the day on which they first performed service in that capacity was "in contravention of the applicable agreements as they were intended, interpreted and applied by the parties thereto." Yet, petitioners ask this Court to "sweep aside" these agreements and to hold that petitioners are entitled to predated seniority among machinist helpers in the same order in which such helpers held seniority as laborers. They base their request upon an alleged custom and practice*

*While strenuously insisting upon application of a non-existent custom and practice to promote laborers in seniority order, petitioners are equally strenuous in resisting application of the admitted custom and practice of denying such promotion to laborers on furlough or leave of absence.

to promote laborers to helper positions in seniority order contrary to an agreement rule providing that seniority as helper shall date from the first day of service on a regular assignment. That alleged custom and practice having been disproved, necessarily the agreements must prevail and petitioners' cause must fail.

CONCLUSION.

If, as petitioners state, the "blanket of protection" of the Act appears to them to have become a "threadbare cover" (p. 23), it is because the Government officials in charge of the veterans' reemployment rights program have attempted to stretch that blanket to cover cases to which the Act was not intended to apply. The unwillingness of those officials to recede from their early rulings that veterans were entitled to what has been aptly termed "superseniority" accounts in large measure for the alleged "uncertainty, confusion, and conflicts" of which petitioners now complain (p. 25). Their suggestion that these difficulties will disappear if this Court will "reestablish" the principle that veterans should be treated as if they had been "continuously on the job" is only an invitation to this Court to overrule its pronouncements in the *Fishgold* and *Campbell* cases that Congress did not intend to sweep aside the seniority systems and that the conventional uses of those systems must be looked to in order to determine the rights of seniority which the Act guarantees to the veteran.

Such uncertainty, confusion, and conflicts as now exist are slight indeed as compared with the chaos which would result if this Court were to establish—not reestablish—a rule that courts must speculate as to what might have been the status of each veteran had there been no war and if each had remained "continuously on the job."

The case was decided correctly below. The decision is in accordance with numerous others involving similar facts, and there is no such conflict as would justify the requested writ.

For the reasons shown, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 29, 1952.

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IN THE

Supreme Court Of The United States

October Term, 1951

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On Petition For Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

BRIEF OF INTERVENING DEFENDANTS-RESPONDENTS IN OPPOSITION.

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IN THE

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STATUTES

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BRIEF OF INTERVENING DEFENDANTS-RESPONDENTS IN OPPOSITION.

Opinions Below

The findings of fact and conclusions of law of the United States District Court for the Western District of Kentucky (R. 122-134) are reported at 92 F. Supp. 770. The order of affirmance of the United States Court of Appeals for the Sixth Circuit (R. 269) is reported at 191 F. (2d) 856.

Jurisdiction

The judgment of the Court of Appeals was entered on October 17, 1951 (R. 269). The petition for a writ of certiorari was filed on January 15, 1952, and notice of the filing thereof was served upon counsel for the intervening defendants-respondents on January 28, 1952. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1).

Counter Statement of Questions Presented

Where a veteran was reemployed in the position which he left to enter the armed forces, with all of the contractual rights and incidents of that position including accumulated seniority, and was subsequently promoted to another position (in a different group or craft or class of employees, with wages, rules and working conditions controlled by different contracts negotiated by a different collective bargaining representative, and with a seniority system under which seniority dates from the time the employee first goes to work in that group), and where such new position was one which the veteran's former position did not entitle him to receive as a matter of right, but which would probably have been offered to him if he had been available to take it instead of being absent in the armed forces, did the Selective Training and Service Act of 1940, as amended, create a statutory right in the veteran to receive such new position, and to be given retroactive seniority in it, dated back to the time when it is assumed the position first would have been offered to him.

Statement

The factual picture presented by petitioners' brief in support of the petition herein is in many respects incomplete and inaccurate, and reflects to a considerable extent the conflict between the parties in the courts below with respect to the conclusions of fact to be drawn from the record. Although conceding that as laborers they had no *right* to be promoted to machinist helper positions in order of their laborer's seniority, they still insist that they *would* have been so promoted had they not been in the armed forces. They further seek to confuse the issues, and to prejudice the court against the respondent parties, by injecting a charge of discrimination against Negroes; when in fact, the

effect of a judgment for petitioners would have been to place them in a position superior to that of Negro machinist helpers whose laborer's seniority antedated that of petitioners.

While these and other questions, as to the facts of the case and the proper interpretation of the applicable collective bargaining agreements involved, would require extended clarification if this Court were to review the judgments below, it does not seem to us that they assume major importance with respect to the question of whether the petition should be granted; and our reference to them is primarily for the purpose of noting our disagreement with the statement presented by petitioners.

In this connection, however, the Court should be apprised of the manner in which the facts of the case were presented to the courts below. Substantially all of the material facts in the case were agreed to in a detailed written stipulation signed by counsel for all parties and filed with the District Court. (R. 53-64.) Notwithstanding this fact, lengthy oral testimony was introduced on behalf of plaintiffs below, the greater portion of which was objected to by counsel for these respondents on the ground that it constituted an attempt to repudiate and refute, rather than supplement, the stipulation thus entered into. (R. 141-143.) The District Court proceeded to hear this testimony, subject to final order of the court on its materiality and admissibility (R. 147), and allowed the objections to such testimony to be continuing (R. 149). At the conclusion of the trial, counsel for all defendants joined in an oral motion to exclude all evidence introduced by the plaintiffs, and the case was submitted. (R. 234.) Thereafter, in its findings of fact and conclusions of law, the District Court held that the oral testimony failed to contradict the facts contained in the stipulation, and that "The facts as con-

tained in the stipulation of the parties filed herein September 1, 1950, are adopted by the Court . . ." (R. 123.)

This view of the facts of the case, as being fully presented by the stipulation, was endorsed by the Court of Appeals below, which noted in its order (R. 269) that ". . . the Findings of Fact by the District Judge are in accordance with the stipulation of the parties herein . . ."

Nevertheless, it should be noted that petitioners are still unwilling to present their case on the basis of the facts as stipulated. Many of the record references in petitioners' statement of facts are to the transcript of the testimony objected to below, and which these respondents assert was improperly introduced and may not be considered by this Court.[1] We respectfully submit that any consideration of the factual aspects of the case must be on the basis of the stipulation subscribed to by all parties.

Argument

The question presented in this case has never been ruled upon by this Court. If it were true, as petitioners assert, that there existed any conflict or confusion among the other federal courts on this question, then we would be the first to agree with petitioners that the question should be settled by this Court. But such is not the situation.

On its facts this case falls squarely within the category of cases which have come to be described, by courts and counsel conversant with the field of veterans' reemploy-

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[1]While it is not clear whether the findings of the District Court were to the effect that respondents' objections to this oral proof were well taken, or that the testimony was simply impotent to contradict the stipulation, it is established that respondents may continue to urge their objection to such testimony since they are doing so in support of, rather than in opposition to, the judgments below. *LeTulle v. Scofield,* 308 U.S. 415, 421-422; *Langnes v. Green,* 282 U.S. 531, 538-539.

ment rights, as the "high probability" cases. The high probability type of claim originated with the case of *Hewitt v. Chicago, South Shore and South Bend Railroad Company,* decided July 23, 1946, by the United States District Court for the Northern District of Indiana, and unofficially reported at 18 L.R.R.M. 2262.[2] In that case the returning veteran who had been a car cleaner claimed the right to a position as carman helper, with retroactive seniority to the time when he claimed he would have received the promotion had he not been in the armed forces. The District Court found that although car cleaners had no contractual right to such promotions in order of their car cleaner seniority, Hewitt's claim should be sustained on the ground that there was a "high probability" of his having been promoted in seniority order had he not been in the armed forces. The following excerpt from the court's oral opinion illustrates the reasoning which was applied:

> "If it is in the speculation area, I should rule against Hewitt; if it is a matter of certainty, I should rule for him. But the problem is not that easy. It seems to me the evidence lends itself to a high probability that he would have been promoted to the job of car helper on that date." (18 L.R.R.M. 2263.)

On April 29, 1947, this holding was reversed by the Court of Appeals for the Seventh Circuit, in the case of *Hewitt v. System Federation No.* 152, *etc.*, 161 F. (2d) 545. Since that time the courts in numerous cases have uniformly rejected the "high probability" claims of returning veterans. Insofar as we are aware, this is the first time that a review by this Court has even been sought on such a case.

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[2]Labor Relations Reference Manual, a publication of the Bureau of National Affairs, Washington, D. C.

Absence of Conflict in Existing Decisions of the Federal Courts.

Petitioners seek review in this case on the grounds that the decision below is in probable conflict with this Court's decision in the case of *Oakley v. Louisville & N. R. Co.*, 338 U.S. 278, and that it is in conflict with the decisions of the Courts of Appeals for the Seventh and District of Columbia Circuits in *Morris v. Chesapeake & O. Ry.*, 171 F. (2d) 579 (C.A.7), cert. den. 336 U.S. 967, and *Conner v. Pennsylvania R.R.*, 177 F. (2d) 854 (C.A.D.C.), cert. den. 339 U.S. 919. All of those cases involved clear-cut contractual rights possessed by the veteran in connection with the position which he left to enter the armed forces.[3] In the *Oakley* case, persons employed as machinists, and who were laid off in force reductions, had the contractual right to preferential hiring at other points on the railroad where machinists were needed. In the *Morris* case, telegraphers had a contractual right to be promoted to new or vacant train dispatcher positions in order of their telegrapher's seniority. And the *Conner* case, as the Court of Appeals stated, was to be distinguished from the *Hewitt* case because the latter involved no "contractual right to transfer from one roster to another on the basis of seniority." (177 F. (2d), 858.)

The cases cited at page 25 of petitioners' supporting

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[3]Even in the field of contractual right, as contrasted with high probability, cases, it is not conceded that these three cases either support the position urged by the Solicitor General, or present any conflict with decisions of other Circuits. The *Oakley* case, of course, was not decided on its merits by this Court. In deciding that case, the Court accepted as true all of the allegations of the complaints of the plaintiffs Oakley and Haynes, and expressly declined to rule on anything but the effect of the Act's prohibition against discharge for one year. (See Note 2 to the Court's opinion, 338 U.S., 280.) In both the *Conner* and *Morris* cases, the value of the decisions as precedents with respect to the interpretation of the Act is largely destroyed by the fact that in each case there was evidence of a practice, by agreement between the company and the union, whereby returning veterans were given retroactive consideration for vacancies occurring during their absence (*Conner* case), or positions were tentatively assigned to employees *in absentia*, pending the establishment of their qualifications (*Morris* case).

brief fail to demonstrate any conflict among the various Circuit Courts of Appeals on the question here presented. The cases of *Mentzel v. Diamond*, 167 F. (2d) 299, and *MacLaughlin v. Union Switch & Signal Co.*, 166 F. (2d) 46, can of course have no weight in view of the later decision in *Dougherty v. General Motors Corp.*, 176 F. (2d) 561, cert. den. 338 U.S. 956, wherein the Court of Appeals for the Third Circuit placed itself in accord with all of the other Courts of Appeals that have passed upon the vacation pay cases. The case of *Spearmon v. Thompson*, 167 F. (2d) 626, not only presents no conflict with the decisions below, but was in fact relied upon by the District Court (R. 134) because of the holding with respect to the plaintiff Delozier. (See *Delozier v. Thompson*, cert. den. 335 U.S. 886.) The remainder of the cases cited by petitioners involved issues completely unrelated to the question presented here.

We submit that there is no conflict among the federal courts which have passed on this question, and that the only conflict which exists is that created by the unwillingness, on the part of the governmental agencies and officials who have charge of this litigation on behalf of returning veterans,[4] to accept a principle which the courts have considered settled since the decision of the Court of Appeals for the Seventh Circuit in the *Hewitt* case, supra. And the only "semi-anarchic" (Petitioners' brief, p. 25)

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[4]The veterans are generally represented before this Court by the Solicitor General of the United States, as in this case, and the Assistant Attorney General, Special Assistants to the Attorney General, and Attorneys for the Department of Justice (*Oakley* case). The policy with respect to such litigation is controlled to a large extent by the Bureau of Veterans' Reemployment Rights of the Department of Labor, which periodically issues interpretative bulletins and legal guides, and sends representatives to consult with the United States District Attorneys charged by the Act with the duty of acting as counsel for returning veterans in the enforcement of their rights under Section 8. In the proceedings below the petitioners herein were represented by Mr. Harry M. Leet, Chief Council of the Veterans Reemployment Rights Division of the Department of Labor (R. 137). Mr. Leet also represented the plaintiffs in the case of *Foster v. General Motors Corp.*, 191 F. (2d) 907, now before this Court (No. 533) on petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit. See also appearances as amici curiae in *Plomb Tool Co. v. Sanger* (C. A. 9), 193 F. (2d) 260, 261.

condition that we are aware of in this field has consisted of the repeated institution of lawsuits on behalf of returning veterans involving claims and theories which have been just as repeatedly rejected by the courts. Thus in the period of almost five years since the decision of the Court of Appeals for the Seventh Circuit in the *Hewitt* case, supra, numerous claims of an almost identical nature have been filed and rejected by the courts, without any attempt being made to obtain review by this Court until the present time. Under these circumstances, a claim that the field is semi-anarchic comes with little grace from counsel for petitioner.

Congressional Rejection of Petitioners' Contentions.

Petitioners argue that Congress intended to provide a "blanket of protection" for veterans which "has worn through in many spots and has become a threadbare cover" as a result of the interpretation of the statute by the courts. The fact is, of course, that there is nothing in the legislative history of the 1940 Act to justify petitioners' interpretation of it, and subsequent legislative developments in fact clearly demonstrate the unwillingness of Congress to weave such an all-encompassing blanket of protection as that which petitioners envision.

Thus, when the Selective Service Act of 1948 (50 U.S.C. App. Sec. 451, et seq.) was under consideration, the following language embodied in H.R. 6401, 80th Congress, 2nd Session, was proposed to be included in order to entitle returning veterans to be restored not just to their "former positions", as in the 1940 Act, but to other and different positions to which they might have been promoted had they not been absent:

> "Sec. 8 (d) Any person who is restored to a position in accordance with the provisions of paragraph

(A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, *shall be entitled to all promotions,* increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to *which he would have been entitled had he been working for the employer during his period of service in the armed forces* * * *" (Emphasis supplied.)

Congress did not include the above quoted language in the Act as finally adopted, but instead adopted the following provision:

"(2) *It is hereby declared to be the sense of the Congress* that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *should* be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his restoration to such employment." (Emphasis supplied; Selective Service Act of 1948, Section 9 (c) 2).

That the language last quoted above was intended to be *precatory* and not mandatory is clearly indicated by a reading of the following provisions of Section 9 (b) of the 1948 Act imposing mandatory obligations to reemploy veterans upon (A) the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, and (B) upon private employers, but providing only for a "precatory" or suggested treatment of veterans who left the employment of (C) any state or political subdivision thereof:

"(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, *such person shall* * * * be restored to such position * * *

"(B) if such position was in the employ of a private employer, *such person shall* * * * be restored * * * to such position

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby *declared to be the sense of the Congress that such person should* * * * be restored to such position * * *"[9] (Emphasis supplied.)

We submit that the rejection by Congress of a proposal for the express guaranty of promotions for veterans, and the substitution therefor of language which on its face does not require such treatment but merely suggests its desirability as a matter of policy, clearly demonstrates that Congress did not wish to create any such rights as petitioners assert in a legal, or mandatory, sense, but was content with the statement of a policy the application of which it desired but did not require.

In view of this legislative background, it becomes apparent that litigation such as this simply constitutes an attempt to obtain from the courts, under the guise of statutory interpretation, something which Congress has expressly refused to grant.

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[9]The quoted "sense of the Congress" language is identical with that appearing in Section 8 (b) (C) of the 1940 Act.

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Conclusion

For the reasons stated above, we believe that the decision below is correct and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated at Toledo, Ohio
February 26, 1952

LEED THRU

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all parties of record herein on the 26th day of February, 1952, by mailing copies thereof to the Solicitor General of the United States, counsel for petitioners Harry Gregory, Charles Van Vactor and Casper Waters; and Messrs. C. S. Landrum, J. P. Hamilton and H. T. Lively, counsel for respondent Louisville & Nashville Railroad Co.

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